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**The Criminal Responsibility of Children and Young People: An Analysis of Compliance with International Human Rights Obligations in England and Wales**

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**Abstract**

The question of the minimum age of criminal responsibility in England and Wales is one which regularly arises. The recent confirmation of the abolition of the presumption of *doli incapax* raised some concerns about the resultant treatment of young people in the criminal justice system. This paper approaches this issue from

the perspective of England and Wales' compliance with human rights obligations. The application of the substantive criminal law is analysed with respect to its compliance with relevant international human rights standards. Research relating to the engagement of the criminal justice process with young people is examined, leading to a conclusion that the position in practice bears more consideration to the status of young people than the substantive law might initially suggest. However, concerns relating to arbitrariness in this practice lead to a conclusion that raising the minimum age of criminal responsibility is desirable.

## **Keywords**

Criminal law; criminal justice; youth justice; human rights; criminal responsibility; minimum age

## **Introduction**

The minimum age of criminal responsibility in England and Wales is ten years of age. Below this age children cannot be convicted of any criminal offence.<sup>1</sup> It is often pointed out that this age is low in comparison with other European legal systems,<sup>2</sup> and that this young age is out of step with 'ages of responsibility' in other areas of the law (such as driving a car, purchasing cigarettes and alcohol, voting in elections, getting married, having sexual relationships, serving on a jury, entering contracts and choosing to refuse medical treatment), which are typically in the sixteen to eighteen age bracket. It is also suggested that the low minimum age of criminal responsibility

in England and Wales is of dubious compatibility with obligations under various international human rights instruments. This paper explores the last of these arguments through an analysis of substantive criminal law and contemporary English criminal justice practice. The first part of the paper provides an exposition of the relevant international human rights provisions. Parts two and three examine the extent of compliance with these norms in the substantive criminal law and criminal justice process respectively.

## **The International Human Rights Framework**

Various human rights norms potentially impact on the question of the criminal responsibility of children. This paper focuses, in particular, upon the Beijing Rules, the United Nations Convention on the Rights of the Child (UNCROC) and the European Convention on Human Rights and Fundamental Freedoms (ECHR).

### *Beijing Rules*

International human rights instruments were relatively slow to give specific and careful attention to youth justice in general and to the question of the appropriate minimum age for criminal responsibility in particular. The first to do so in any detail was the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the so called Beijing Rules). These rules are not binding, states are merely invited to apply them, but because of their relative specificity on the age of criminal responsibility question, they are important. The original draft of the rules had stated that an age below 12 years would seem 'hardly compatible with the legal and social

implications of criminal responsibility'.<sup>3</sup> However, agreement could not be reached on this part and it was excluded from Article 4(1) which provides: 'In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.' An official 'Commentary' is attached to the Rules, and is viewed as a central part of them. This states that there should be 'a close relationship between the notion of responsibility of delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc.).'

#### *United Nations Convention on the Rights of the Child*

In contrast to the Beijing Rules, the United Nations Convention on the Rights of the Child (UNCROC), which was adopted by the General Assembly of the United Nations on 20 November 1989, has binding force under international law. Although it has not been incorporated into the domestic law of England and Wales, it is regarded as a crucial source of human rights norms. It makes wide ranging provision for the protection of children (under 18s) and a number of its articles are directly or indirectly relevant to the treatment of children by the criminal law. In Article 3(1) a centrally important general principle is stated: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' Article 37(a) provides a hard concrete floor of protection for children against the most punitive type of penal intervention (capital punishment, whole life time imprisonment, torture or other cruel, inhuman or degrading treatment or punishment) and 37(b) a softer, but nevertheless firm, protection against criminal

justice intervention more generally: 'arrest, detention or imprisonment of a child' should be 'used only as measure of last resort and for the shortest appropriate period of time.' Article 40(1) provides guidance on the manner in which children 'recognised as having infringed the penal law' should be treated, and this must be 'consistent with the promotion of the child's sense of dignity and worth' and, specifically, must 'take into account the child's age' and 'the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.' Article 40(3)(a) requires 'the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law'. This is generally interpreted as requiring a minimum age of criminal responsibility below which a child cannot be subject to criminal law but, as per the Beijing Rules, no particular minimum age is specified as an acceptable norm. Finally, Article 40(3)(b) provides a steer towards a policy of diversion from formal criminal justice processing of children, although the inclusion of the phrase 'whenever appropriate and desirable' provides a state with considerable latitude to pay lip service should it not wish to embrace the spirit of this particular injunction. In *S and Marper v the United Kingdom* the European Court of Human Rights (ECtHR) referred to the UNCROC and stressed that its central message with regard to criminal justice was the importance of treating young people differently.<sup>4</sup>

### *European Convention on Human Rights and Fundamental Freedoms (ECHR)*

The ECHR is of crucial importance to the position in England and Wales as, in contrast to the previously discussed international human rights instruments, since the implementation of the Human Rights Act 1998, citizens are able to rely on Convention rights directly in the domestic courts. The ECHR does not, however,

have much to say regarding the position of children specifically in relation to the criminal law. This is not to say that the ECHR is irrelevant, however. The applicability of the various articles of the Convention in this context was helpfully tested before the ECtHR in the case of *T v UK; V v UK*.<sup>5</sup> This case involved the highly publicised criminal trial in an English Crown Court of two young boys (10 years at the time of the offence) for the murder of 2 year old James Bulger. The majority of the Court found that Article 3 of the Convention (which provides an absolute prohibition on torture or inhuman or degrading treatment) was not breached through subjection of the boys to the criminal justice system and nor was Article 6 (which outlines conditions necessary for a fair trial) breached *per se* by a system which permits criminal prosecution. However, the Court did find that the specific nature of the trial procedure the boys had experienced did breach their fair trial rights under Article 6(1).

Interestingly, five dissenting judges held that a minimum age of criminal responsibility as low as 10, and consequent prosecution in criminal court at age 11, would almost certainly constitute a breach of Article 3. This is significant as the ECHR is a living document. In other areas of law, as the approach of member states to a particular issue has evolved, dissenting positions with significant support have, a number of years later, been adopted by the Court.<sup>6</sup> It is, however, difficult to discern precisely how generalisable the dissenting judges' finding, regarding the minimum age of responsibility, was intended to be. In particular, it is unclear whether they intended to say that 10 and 11 year olds must be immune from any youth justice intervention to be compatible with Article 3, or whether only a prosecution in a criminal court would constitute a breach.

There was also an attempt in the case to develop an argument combining the fair trial guarantees in Article 6 with the prohibition against discrimination (in this instance on grounds of age) in the enjoyment of Convention rights (Article 14). The argument was that a child just over the age of criminal responsibility, when prosecuted, is subject to arbitrary and unjustifiable discriminatory treatment in comparison to a child just under the minimum age, and that prosecution (particularly, as in the *T v UK; V v UK* case, where it is in the adult Crown Court) is disproportionate to any legitimate aim of the state.<sup>7</sup> The Court, however, did not examine this argument because the argument under Article 6(1) alone had been successful.

Having set out the relevant human rights instruments, the principal conclusion to be drawn is that while no absolute minimum age of criminal responsibility is set, an obligation is imposed on states to ensure that in responding to offending by young people, careful regard is paid to their special characteristics. Contemporary developmental psychological research, augmented by the findings from neuroscience, consistently points to the distinctive features of adolescents as a group. It suggests that they are typically less able to 'imagine alternative courses of action, think of potential consequences of these hypothetical actions, estimate probabilities of their occurrence, weigh desirability in accordance with one's preferences, and engage in comparative deliberations about alternatives and consequences.'<sup>8</sup> Importantly it also suggests that for most people this will be a temporary, 'adolescent limited', experience.<sup>9</sup> Such research has recently been utilised to help to persuade the U.S. Supreme Court that some of the most egregious examples of American penal populism (the application of the death penalty and life

imprisonment without the possibility of parole to under 18s) were unconstitutional.<sup>10</sup> It serves to underline the necessity for a strong human rights framework in order to ensure both procedural and substantive protection for young people.

*Prima facie*, setting the minimum age of responsibility at 10 could raise questions as to England and Wales' compliance with these obligations. Indeed, on a number of occasions, the United Nations Committee on the Rights of the Child in its monitoring reports on the UK's compliance with the UNCROC has explicitly expressed concern regarding the low age of criminal responsibility.<sup>11</sup> Goldson has argued that 'the practices of unequivocally "responsibilising" and "adultifying" children from the age of 10 years – and accordingly exposing them to the full rigour of an adversarial criminal justice system – as is the case in England and Wales, is clearly at odds with the core principles underpinning [these human rights instruments].' He concludes that, 'Given both the comparatively low age of criminal responsibility in England and Wales and the unmitigated exposure of children to the full weight of criminal law, the jurisdiction is manifestly out-of-sync with the norms of European youth justice law, policy and practice.'<sup>12</sup>

### **Recognition of Youth in Substantive English Criminal Law**

While Goldson's point regarding 'exposure of children to the full weight of criminal law' is understandable in the context of a comparison to practice elsewhere in Europe (where children are generally dealt with in entirely separate, non-criminal, systems), it is worth pausing to consider the various ways in which English criminal law does, in fact, provide some recognition of youth beyond the minimum age of responsibility.



Historically, at common law, the doctrine of *doli incapax* provided a rebuttable presumption, with regard to children above the minimum age of responsibility but below the age of 14, that they lacked the capacity for criminal responsibility. Thus, in relation to a charge against such a young person, the prosecution had to establish not only that the young defendant was responsible for the *actus reus* of the offence, with the requisite *mens rea*, in the absence of a relevant substantive defence, but also was compelled to rebut the presumption of *doli incapax* by showing that the child appreciated that their actions went beyond ‘mere naughtiness or childish mischief’ and were ‘seriously wrong’.<sup>13</sup>

A number of commentators have noted that, in practice, prosecutors were rarely troubled by *doli incapax*.<sup>14</sup> Nevertheless, it is clear that in the few cases where rebutting the presumption was problematic, it was irritating for the prosecutorial authorities. These irritations percolated to the surface of the judicial system in a number of appellate court decisions displaying considerable judicial disquiet. So, for example, Lord Justice Bingham was moved to observe that *doli incapax* could ‘lead to results inconsistent with common sense’.<sup>15</sup> Such disquiet culminated in the attempt of Laws J to abolish the doctrine on the basis that it was, echoing Bingham LJ, ‘unreal and contrary to common sense’.<sup>16</sup> Although the House of Lords subsequently allowed the Appeal in that case, because to do otherwise would involve inappropriate ‘judicial legislation’,<sup>17</sup> four members of the Committee strongly suggested that Parliament should consider revising the law. This invitation was embraced by the then Opposition Labour Party, which was in the process of shedding its perceived weakness in the ‘politics of law and order’, in comparison to the Conservative Party.<sup>18</sup> It therefore proposed in a Party Paper before the 1997

General Election, to abolish *doli incapax* and legislated to that effect in the Crime and Disorder Act 1998.<sup>19</sup>

Since the abolition of *doli incapax*, it could be suggested that the criminal law is blind to youth once the tenth birthday milestone is reached. This would not, however, pay sufficient regard to the scope for age to be recognised in other areas of doctrine. As noted above, in each criminal case the prosecution must prove that the defendant perpetrated the relevant harm with the requisite *mens rea*. The principle ensures that the imposition of censure and punishment by the state on an individual is justified by only holding as criminally responsible those who can be shown to be to blame for committing a prohibited action. The essence of the principle, according to Ashworth, is that 'criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour and its consequences'.<sup>20</sup> In other words, there should be no criminal conviction without proof of fault. In some contexts, with regards to some forms of *mens rea*, age may well be a relevant factor; good examples are the offences of theft, and other property offences, where the *mens rea* element of dishonesty requires that the prosecution establish that the defendant was aware that his conduct would be considered dishonest by the ordinary standards of reasonable and honest people.<sup>21</sup> Indeed in the case of *I v DPP* the requirements of dishonesty and *doli incapax* appear to have been treated as indistinguishable, suggesting that the defence, in effect, continues to operate in relation to dishonesty offences.<sup>22</sup>

Similarly, after a significant period where a controversial judicial formulation of the key *mens rea* concept of recklessness effectively excluded consideration of whether young defendants were, or even had the capacity to be, aware of the risk of harm posed by their behaviour,<sup>23</sup> the House of Lords firmly reinstated a subjective formulation. In Lord Bingham's judgment, it would be 'neither moral nor just to convict a defendant (least of all a child) on the strength of what someone else would have apprehended if the defendant himself had no such apprehension.'<sup>24</sup> Lord Steyn, was even more direct in his recognition of the need for the criminal law to be conscious of the particular needs and rights of children. Importantly, he relied on Article 40 of the UNCROC (discussed above) to argue that it not only imposed procedural obligations on states to protect the special interests of children in the criminal justice system but was also relevant with regard to the substantive law.<sup>25</sup> Lord Steyn might also have drawn upon the discrimination argument based on Articles 6 and 14, discussed above. An argument based on Article 6 had been put to the Court of Appeal but was rejected on the basis that Article 6 was concerned with procedural protections and did not engage the substantive criminal law. It is disappointing that none of the judges in *G and Another* took the opportunity to engage with the potential applicability of the ECHR to the application of substantive criminal law to children. Such an opportunity was similarly missed when the House of Lords recently ruled on the abolition of *doli incapax*.<sup>26</sup> Nevertheless, Lord Steyn provides a very rare English judicial recognition of the various international human rights instruments having 'bite' in connection with substantive criminal law (as opposed to procedure). The approach of Lord Steyn should be welcomed. As discussed above, the Beijing Rules, UNCROC and the ECHR demand that the distinctive needs of young people are attended to when young people accused of

offending are dealt with. It is clearly right that procedural protections must be adapted to ensure young people can fully participate in the criminal justice process; it is not clear why this should not extend to the substantive law. As Halpin observes, 'The idea that these safeguards should be in place to ensure that the child is capable of participating in the proceedings, and then removed when it comes to determining the child's criminal responsibility, is inherently absurd.'<sup>27</sup>

The age of the defendant may also come into play with regard to a number of the substantive defences. So, for example, 'duress by threats' provides a defence where a defendant has a reasonable belief he would be seriously injured or killed were he not to commit the offence, and that a person of 'reasonable firmness' would have done the same.<sup>28</sup> In assessing whether a person of 'reasonable firmness' would have so acted, the Court of Appeal specifically observed in *Bowen* that this objective evaluative standard could be adjusted to recognise youth, as 'a young person may not be so robust as a mature one.'<sup>29</sup> A similar allowance for relative youth, inherited from the common law defence of provocation, can also be found in the test for evaluating whether a defendant who lost their self-control exercised a 'normal degree of tolerance and self-restraint' in response to a fear of violence or an extremely grave circumstance, for the partial defence to murder of 'loss of control'.<sup>30</sup>

Finally, in this regard it is worth noting that in the context of sexual offences it is possible for defendants under the age of eighteen, in certain circumstances, to be prosecuted for a lesser offence with lower penalties than an adult would be in the same circumstances.<sup>31</sup>

The substantive criminal law does therefore make some allowance for relative youth, but it is fair to say that there are considerable limitations. As regards recognition of relative immaturity through *mens rea*, this is clearly of limited use where aspects of an offence require objective or even strict forms of liability. Bennion has argued that in 'complex offences', the principle of *mens rea* demands that the prosecution demonstrate that young defendants are capable of understanding the ingredients of the crime. In other words, the concept of *mens rea* contains an implicit form of *doli incapax* within itself.<sup>32</sup> This argument has not, however, found favour with the appellate courts. Moreover, even in situations where a young person is accused of an offence with a subjective form of *mens rea* this, in reality, serves only a minimally protective function. There are two principal reasons for this. First, orthodox subjectivism in English criminal law demands only a fairly narrow cognitive capacity in relation to the intended or foreseen harm. Young children may well appreciate that their behaviour could hurt someone but have a relative lack of understanding of the full ramifications of that harm. Secondly, a distinction needs to be drawn between substantive provisions and evidential questions. Given that it is impossible for fact-finders to know what was going on inside the defendant's head at the relevant time they are likely to resort to drawing inferences from their own (adult) experiences.

The limitations of current doctrine were also exposed in the recent case of *R v Wilson*.<sup>33</sup> In that case a 13 year old boy helped his father to kill a man. He was too frightened of his father's violence to refuse. The Court of Appeal held that 'although there may be grounds for criticising' the position, the law was clear that duress was no defence to murder whether the defendant was the principal offender or, as in this case, an accessory. In his commentary on the decision Ashworth observed that it 'reflects badly on English criminal law. To apply the same standards to a 13-year-old

as to an adult is to ignore large amounts of evidence about the immaturity of children.<sup>34</sup> The inadequacy of the law of murder in recognising the distinctiveness of youth was understood by The Law Commission in its Report '*Murder, Manslaughter and Infanticide*'.<sup>35</sup> A cogent case was made for a partial defence to murder of 'developmental immaturity' based, in part, on the perversity of the present situation where an adult with a 'mental age' of ten could rely on a defence of diminished responsibility in response to a murder charge but an ordinary ten year old would not have such a partial defence. This proposal was rejected by the Government.

As well as the provision of specific examples illustrating the limitations of current criminal law doctrine in accommodating young people's needs, a wider point can be made about the general framework of criminal law. In England and Wales, the system is, in essence, underpinned by a liberal framework. The legitimacy of criminal punishment, according to orthodox liberal thought, is based on an assumption about individuals as autonomous moral agents with capacity for free will. Where such an agent can be shown to have chosen to commit a criminal offence (without a valid justifying reason or excusatory condition) then legal punishment is justified. Norrie, in a series of publications, has built a powerful critique of this 'abstract individualism'.<sup>36</sup> His argument, in essence, is that the criminal law's myopic focus on individual responsibility and culpability, although providing a potentially important bulwark against drifts to authoritarianism, has the effect of marginalising and silencing other important explanations for the harm that has been caused by the crime. Empirical research suggests that youth offending is associated with a range of factors many of which cast serious doubt on the appropriateness of the criminal law's emphasis on individual agency, responsibility and punishment. Research, for example, has shown strong causal connections between certain behavioural

disorders, such as attention deficit and hyperactivity, and youth offending and, moreover, that some people are genetically more likely to suffer from these conditions.<sup>37</sup> Recently, as noted above, considerable attention has been paid to neuro-scientific research in which new brain imaging techniques have been used to suggest links between differences in neural functioning and offending.<sup>38</sup> Criminological research has also pointed to the importance of social context in explaining offending, including abusive family backgrounds, poverty, school exclusion and lack of job opportunities.<sup>39</sup> This research suggests that a complex web of responsibility surrounds each criminal act and that the reductionist tendency of criminal doctrine often serves to mask this. The appropriateness of criminal prosecution for children, which international human rights norms call into question, is also challenged by this body of research.

International human rights norms demand that the distinctiveness of youth be recognised whenever the criminal law is applied to children. The previous section has shown that substantive criminal law makes some allowance for youth. However, it is limited, particularly since the abolition of the *doli incapax* doctrine, but also because human rights are seen as relevant primarily to procedural protections rather than shaping questions of liability and responsibility. When one's focus shifts, however, from substantive doctrine, to criminal justice practice, there is an argument that the purchase of these international human rights instruments increases.

Consider, for example, the Code for Crown Prosecutors. Decisions as to whether to charge and prosecute suspects must be made in accordance with the Code. The Code provides that 'prosecutors must bear in mind, in all cases involving youths, that the United Kingdom is a signatory to the United Nations 1989 Convention on the Rights of the Child and the United Nations 1985 Standard Minimum Rules for the

Administration of Juvenile Justice.’<sup>40</sup> It was observed above that neither the Beijing Rules nor the UNCROC were part of the law of England and Wales but their inclusion in the Code raises the question of whether these instruments are technically legally binding on Crown Prosecutors, and thereby challengeable in the courts. This issue was raised, but not decided upon in a recent judicial review.<sup>41</sup> What is clear is that whatever the technical legal position these norms should be central to prosecutorial decision making where children are involved.

## **Young People in the Criminal Justice System**

Everyday and everywhere children and young people do things which cause harm. This occurs in the home, in the school playground, in the park, outside the local shop, in the city centre and elsewhere. Often this can include hurting other people or interfering with others’ property. Much of it could potentially come within the ambit of crime and criminal justice but, as Nils Christie writes, ‘Crime does not exist. Only acts exist, acts often given different meanings within various social frameworks. Acts, and the meaning given to them, are our data. Our challenge is to follow the destiny of acts through the universe of meanings.’<sup>42</sup> In other words, much of the harmful behaviour will never be thought of by anyone as ‘crime’, far less processed as such. So, for example, parents will deal with acts of aggression between their children, and wilful acts of damage to their property, without any recourse to the label crime. Similarly, schools will routinely deal with harmful behaviour in the classroom and the playground with varying degrees of formality but only very rarely through



deployment of the crime label. Much the same thing could be said of all organised groups involved in the supervision of young people such as youth or sports clubs.

There is now a considerable body of empirical evidence examining the nature and extent of harmful behaviour which can be attributed to young people. Much of it is based on the use of 'self-report' survey techniques. The most recent of these, in England and Wales, was the Home Office's 'Offending, Crime and Justice' Surveys conducted between 2003 and 2006.<sup>43</sup> In common with previous studies of this nature it was found that 'offending' was by no means unusual among young people in England and Wales. In the latest sweep of the survey it was found that more than one quarter (26 per cent) of the 10 to 17 year olds sampled reported having committed one of the harmful acts covered.<sup>44</sup> This was higher for boys (30 per cent) than girls (22 per cent). A significant proportion of the youngest age bracket, 10-11 year olds, reported having offended (17 per cent) and the peak age of offending was in the 14-15 year old bracket (32 per cent); the prevalence of offending fell steadily in each subsequent age cohort.<sup>45</sup> The prevalence of offending reported by young people in the four successive sweeps of the survey did not change significantly over time.<sup>46</sup> In terms of the type of misbehaviour engaged in by young people, self-report studies tend to find relatively high proportions of minor or even trivial offences being reported (e.g. dodging fares, shop-lifting, criminal damage or graffiti) whereas reports of more serious offences (e.g. burglary or robbery) are much rarer.<sup>47</sup> Although the Home Office surveys consistently found 'assaults' to be highly prevalent, many of these were minor with little, or no, injury being caused.<sup>48</sup>

With such a high prevalence of behaviour which could potentially be labelled and processed as 'criminal' being committed by young people, it is not surprising that, in terms of formal action: 'the typical response to youth crime is no response at all'.<sup>49</sup> Much of it goes undiscovered or, as noted above, is dealt with within other social institutions, such as the family or school. When behaviour which could be labelled as 'offending' is brought to the attention of the youth justice system, generally through the police, significant proportions of cases do not proceed to be dealt with formally. For this reason changes in the numbers of offences and offenders recorded by the youth justice system over time do not (or do not only) reflect changes in youth crime rates but are, to a considerable extent, a function of changes in processing practice. As one would expect, the system processes significantly fewer offences committed by the youngest children compared to older teenagers. So of the 198,449 proven offences processed in 2009/10, 903 (0.5 per cent) were committed by 10 year olds, and 59,490 (30 per cent) by 17 year olds. In terms of the type of disposals the system imposes on young people, a significant proportion (41 per cent) are in the form of pre-court warnings.<sup>50</sup> Of the court disposals, 5130 (3 per cent) were custodial. As far as the youngest children dealt with by the system are concerned, 94 per cent of 10 year olds' disposals were pre-court. Recalling the relatively high prevalence of self-report offending uncovered in survey research, even amongst the youngest age brackets, it is clear that: (i) society filters out a very large proportion of young people's misbehaviour before it gets to the youth justice system; much which could be 'criminal' is not labelled as such; and (ii) the youth justice system deals with large proportions of the offences which are processed pre-court.

So from a large well of behaviour which could potentially be labelled and processed as criminal, the system selects only some, and it is at its most selective with the

youngest children. This suggests that the demands of international human rights norms to give due regard to the particular rights and needs of young people bites to a greater extent in the application (or non-application) of criminal law than in substantive doctrine. However, it remains the case that a substantial number of young people do have the criminal law applied to them and find their way into the youth justice process (106,969 young people in 2009/10). Furthermore, a significant number of young people find their way into the 'deep' end of the system. So, for example, of particular concern to the European Court of Human Rights in the case of *T v UK; V v UK* was the fact that the two young children had been prosecuted in the adult Crown Court rather than the Youth Court. The manner in which this was done was held to have breached the fair trial guarantees under Article 6 of the ECHR. Subsequently, a practice direction was issued which required modifications to procedure to be made whenever children were prosecuted in the Crown Court. These are supposed to ensure the child is not humiliated and can participate in the proceedings.<sup>51</sup> However, ultimately, as commentators such as Fionda and Fortin have pointed out, whatever cosmetic changes are made, it remains a Crown Court trial.<sup>52</sup> This practice continues in respect of a few thousand children each year, despite repeated concerns about it from the United Nations Committee on the Rights of the Child, and the recommendation from Lord Justice Auld's review of the criminal courts that the practice should stop.<sup>53</sup> Also concerning, from a human rights perspective, are the children who end up being remanded or sentenced to custodial institutions. Although there has been a substantial decrease in recent years (the juvenile custodial population falling from around 3000 in 2008, to around 2000 in 2011), the use of custody for under 18s remains high in comparison to other European countries.<sup>54</sup>

Furthermore, important recent empirical evidence shows that youth justice systems are not deployed on the population even-handedly. Researchers from the Edinburgh Study of Youth Transitions and Crime,<sup>55</sup> (a longitudinal study following a cohort of children from the time they began secondary school in 1999), have found that, when self-reported offending was controlled for, 15 year-olds having 'adversarial contact with police' were much more likely to be low social class boys, from broken families and living in deprived neighbourhoods. They were also more likely to spend time 'hanging around' in public spaces. Crucially, following regression analysis, 'previous form' was found to be the most powerful predictor of later adversarial police contact. In other words, first time contact with the youth justice system will tend to arise from a combination of offending (as well as other 'risky behaviours' such as under-age drinking and drug-use), coming from a certain disadvantaged background, and 'hanging around' in public places with similarly situated friends. Thereafter, it is the 'usual suspects' that become the recurring targets of the system. Moreover, further analysis has suggested that the deeper a young person is drawn into the youth justice system, and the more intensive the intervention, the less likely it is that they will desist from offending.<sup>56</sup> In other words, consistent with the classic labelling theorists of the 1960s,<sup>57</sup> and previous longitudinal research in England and elsewhere,<sup>58</sup> the study suggests that youth justice intervention can have perverse criminogenic effects. Consequently, McAra and McVie argue for a policy of 'maximum diversion and minimum intervention.'<sup>59</sup>

The evidence of the unjustifiably unequal impact of youth justice on certain disadvantaged groups, and of the potentially damaging effects of youth justice intervention is deeply troubling and casts serious doubt on the legitimacy of a low

minimum age of criminal responsibility. An additional concern, as regards legitimacy, concerns the inequality of impact on different cohorts over time and across space. It is clear that the scope of the youth justice system varies over time. Thus, during the 1970s there was a significant increase in criminal justice intervention concerning young people, including a marked rise in the custodial population, whereas the 1980s witnessed a period of de-criminalisation and dramatic reductions in the use of custody.<sup>60</sup> More recently, statistics on the number of *offences* by young people resulting in a court or pre-court disposal have been published since 2002/3.<sup>61</sup> There was a rise of 12 per cent from 268,480 to 301,860 in 2005/6, and then a decline of 34 per cent to 198,449 in 2009/10, which represents a drop to 66 per cent of the peak number of offences reached only a few years previously.<sup>62</sup> As noted above, the use of custody for under 18s has also been falling recently. Given that the best indications we have from self-report and victim surveys is that levels of youth crime have been quite stable over this period, these trends are most likely attributable to system effects.<sup>63</sup> While these recent downwards trends are welcome, a question of inter-generational justice arises as regards those children who were caught up in the system in the more zealous phase but who would not be so processed now. It also potentially arises in respect of future generations should policy and practice swing back in a more punitively interventionist direction in the years ahead. Significantly, questions of fairness, equality and justice also arise amongst current cohorts, as data suggests the extent and nature of youth justice intervention varies between different parts of the country, a 'post-code lottery' in common parlance,<sup>64</sup> and that there is some evidence of unjustifiable over-representation of certain ethnic minority groups in the system.<sup>65</sup>

## Conclusion

This paper has examined the substantive criminal law of England and Wales and its application through the criminal justice system to children and young people, against a framework of relevant international human rights norms. On its face, the very low minimum age of criminal responsibility of 10 years looks problematic: the human rights perspective stresses the need for the special position of young people to be given careful consideration. Despite the abolition of the presumption of *doli incapax* some amelioration is provided by a degree of flexibility in a range of substantive criminal law rules but serious limitations remain. Of much greater significance is the world of criminal justice practice, where discretion is used to divert the vast majority of potentially criminal behaviour away from formal criminal justice processing. Empirical research highlighting the potentially negative impact of intensive system contact underlines the importance of this and it is, accordingly, encouraging to see that there has been a reduction in the scope of criminal justice intervention in England and Wales over the last few years.

In the final analysis, however, empirical research also demonstrates the discriminatory way in which the criminal sanction is distributed to young people. The most equitable solution to this distributive injustice is, accordingly, to raise the minimum age of criminal responsibility, to at least 12 years of age (in line with recent moves in Scotland and Ireland) but preferably to 14. This action would help to secure England and Wales' fulfilment of international human rights obligations.

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- <sup>1</sup> The Children and Young Persons Act 1933, s. 50.
- <sup>2</sup> See, e.g., The Howard League for Penal Reform (2008) *Punishing Children: A Survey of Criminal Responsibility and Approaches Across Europe*, London: The Howard League for Penal Reform.
- <sup>3</sup> Cipriani, D. (2009) *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective*, Farnham: Ashgate, p. 52.
- <sup>4</sup> App Nos 30562/04 and 30566/04; (2009) 48 EHRR 50.
- <sup>5</sup> (2000) 30 EHRR 121.
- <sup>6</sup> For example, in *Goodwin v U.K.* [2002] ECHR 588 the European Court of Human Rights found that the U.K.'s restrictions on the legal recognition of transsexuals were incompatible with Articles 8 and 12 of the Convention, there having been a majority in the opposite direction only a few years previously.
- <sup>7</sup> This argument is developed in Emmerson, B. and Ashworth, A. (2001) *Human Rights and Criminal Justice*, London: Sweet and Maxwell, para. 11-04 – 11-08.
- <sup>8</sup> Kambam, P. and Thompson, C. (2009) 'The Development of Decision-Making Capacities in Children and Adolescents: Psychological and Neurological Perspectives and their Implications for Juvenile Defendants'. *Behavioral Sciences and the Law*, Vol. 27, pp. 173-90.
- <sup>9</sup> Moffitt, T.E. (1993) 'Adolescence-limited and life-course-persistent antisocial behavior: A developmental taxonomy', *Psychological Review*, Vol. 100, No. 4, pp. 674-701.
- <sup>10</sup> *Roper v Simmons* 543 US 551 (2005); *Graham v Florida* 130 S. Ct. 2011 (2010).
- <sup>11</sup> See, e.g., most recently, United Nations Committee on the Rights of the Child (2008) Forty-ninth Session: Consideration of Reports Submitted by States Parties Under Article 44 of the Convention – Concluding Observations: United Kingdom of Great Britain and Northern Ireland, Geneva: United Nations.
- <sup>12</sup> Goldson, B. (2009) "'Difficult to understand or defend": a reasoned case for raising the age of criminal responsibility', *The Howard Journal*, Vol. 48, No. 5, pp 514-521.
- <sup>13</sup> *JM (A Minor) v Runcles* (1984) 79 Cr App R 255 at p 259.
- <sup>14</sup> Bandalli, S. (1998) 'Abolition of the Presumption of Doli Incapax and the Criminalisation of Children', *Howard Journal of Criminal Justice*, Vol. 37, p. 114
- <sup>15</sup> *A v Director of Public Prosecutions* [1992] Crim LR 34
- <sup>16</sup> *C (A Minor) v Director of Public Prosecutions* [1996] AC 1 at p 9.
- <sup>17</sup> *Ibid* at p. 37.
- <sup>18</sup> Downes D. and Morgan R. (1997) 'Dumping the "Hostages to Fortune"? The Politics of Law and Order in Post-War Britain', in: Maguire M., Morgan R. and Reiner R. (eds.), *The Oxford Handbook of Criminology*, (pp. 87-134), Oxford: OUP.
- <sup>19</sup> Labour Party, *Tackling Youth Crime: Reforming Youth Justice* (Labour Party, 1996); Crime and Disorder Act 1998, section 34. That this provision abolished not only an evidential *presumption* but the complete doctrine of *doli incapax* was confirmed by the House of Lords in *R. v JTB* [2009] 1 A.C. 1310.
- <sup>20</sup> Ashworth, A. (2006) *Principles of Criminal Law*, 5th ed., Oxford: OUP.
- <sup>21</sup> *R v Ghosh* [1982] 2 All ER 689.
- <sup>22</sup> [1989] Crim L R 498.
- <sup>23</sup> *R v Caldwell* [1982] AC 341; *Elliott v C* [1983] 1 WLR 939.
- <sup>24</sup> *R v G and Another* [2004] 1 A.C. 1034 at p 1055.
- <sup>25</sup> *Ibid*, at p 1061.
- <sup>26</sup> *R v JTB*, above n 19.
- <sup>27</sup> Halpin, A. (2004) *Definition in the Criminal Law*, Oxford: Hart, p. 100.
- <sup>28</sup> *R v Graham* [1982] 1 All ER 801, approved by the House of Lords in *Howe* [1987] AC 417.
- <sup>29</sup> *R v Bowen* [1997] 1 WLR 372 at p 379.
- <sup>30</sup> Coroners and Justice Act 2009, sections 54-55.
- <sup>31</sup> Sexual Offences Act 2003, section 13.
- <sup>32</sup> F Bennion 'Mens rea and defendants below the age of discretion' [2009] *Criminal Law Review* 757 at p 769.

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- <sup>33</sup> [2007] 2 Cr. App. R. 31.
- <sup>34</sup> Ashworth, A. [2008] 'Case Commentary on R. v W [2007] EWCA Crim 1251', *Criminal Law Review*, pp. 138-41.
- <sup>35</sup> Law Commission (2006) *Murder, Manslaughter and Infanticide*, No. 307, London: Law Commission.
- <sup>36</sup> Norrie, A. (2001) *Crime Reason and History: A Critical Introduction to Criminal Law*, Cambridge: Cambridge University Press; Norrie, A. (2000) *Punishment, Responsibility, and Justice: A Relational Critique*, Oxford: OUP.
- <sup>37</sup> Rutter, M. (2010) 'Causes of Offending and Antisocial Behaviour', in Smith, D.J. (ed.), *A New Response to Youth Crime*, Cullompton: Willan.
- <sup>38</sup> Ibid.
- <sup>39</sup> Ibid.
- <sup>40</sup> The Code for Crown Prosecutors (2010), London: Crown Prosecution Service, para. 8.2.
- <sup>41</sup> *R (on the application of E and Ors) v The Director of Public Prosecutions* [2011] EWHC 1465 (Admin).
- <sup>42</sup> Christie, N. (2004) *A Suitable Amount of Crime*, London: Routledge, p 3.
- <sup>43</sup> Hales, J., Nevill, C., Pudney, S. and Tipping, S. (2009) *Longitudinal analysis of the Offending, Crime and Justice Survey 2003-06*, London: Home Office.
- <sup>44</sup> Roe, S. and Ashe, J. (2008) *Young people and crime: findings from the 2006 Offending, Crime and Justice Survey*, London: Home Office, p 18.
- <sup>45</sup> Ibid, p. 18.
- <sup>46</sup> Ibid, p. 13.
- <sup>47</sup> Pople, L. and Smith D.J. (2010) 'Time Trends in youth crime and in justice system responses', in: Smith, D.J. (ed.), *A New Response to Youth Crime*, Cullompton: Willan, p. 65.
- <sup>48</sup> Hales et al, above n 43, p. 7.
- <sup>49</sup> Pople and Smith, above n 47, p. 85.
- <sup>50</sup> Ministry of Justice (2011) *Youth Justice Statistics 2009/10*, London: Ministry of Justice.
- <sup>51</sup> [2000] 2 All ER 285.
- <sup>52</sup> Fionda, J. (2005) *Devils and Angels: Youth Policy and Crime*, Oxford: Hart, p 139; Fortin, J. *Children's Rights and the Developing Law*, London: Butterworths, 2nd edn, p 565.
- <sup>53</sup> Above, n 11; Lord Justice Auld (2001) *A Review of the Criminal Courts of England and Wales*, London: HMSO.
- <sup>54</sup> Ministry of Justice, above n 50.
- <sup>55</sup> McAra, L. and McVie, S. (2005) 'The usual suspects? Street-life, young people and the police', *Criminal Justice*, Vol. 5, No. 1, pp. 5-36.
- <sup>56</sup> McAra, L. and McVie, S. (2007) 'Youth Justice? The impact of system contact on patterns of desistance from offending', *European Journal of Criminology*, Vol 4, No. 3, pp. 315-345.
- <sup>57</sup> E.g. Becker, H. *Outsiders: Studies in the Sociology of Deviance* (Macmillan, 1963); Lemert, E. *Human Deviance, Social Problems and Social Control* (Prentice-Hall, 1967).
- <sup>58</sup> Farrington, D. P. (1977). The Effects of Public Labelling. *British Journal of Criminology*, Vol. 17, pp. 112-25.; Farrington, D. P., Osborn, S. G. and West, D. J. (1978). The Persistence of Labelling Effects. *British Journal of Criminology*, Vol. 18, pp. 277-84; Huizinga, D., Schumann, K., Ehret, B. and Elliot, A. (2003). *The Effects of Juvenile Justice Processing on Subsequent Delinquent and Criminal Behaviour: A Cross-National Study*. Washington, DC, Final Report to the National Institute of Justice.
- <sup>59</sup> McAra and McVie, above n 56, at p. 340.
- <sup>60</sup> Telford, M. and Santatzoglou, S. (forthcoming) 'It was about trust' - Practitioners as policy makers and the improvement of inter-professional communication within the 1980s youth justice process' *Legal Studies*.
- <sup>61</sup> Ministry of Justice, above n 50.
- <sup>62</sup> Ibid.
- <sup>63</sup> Allen, R. (2011) *Last Resort? Exploring the Reduction in Child Imprisonment 2008-11*, London: Prison Reform Trust.
- <sup>64</sup> Ministry of Justice (2010) *Youth Crime: Young people aged 10-17 receiving their first reprimand, warning or conviction, 2000-01 to 2009-10*, London: Home Office, p. 5.
- <sup>65</sup> Hood, R. and Feilzer, M. (2004) *Differences or Discrimination?* (London: Youth Justice Board).